POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE; WASTE ACTION PROJECT; WASHINGTON PUBLIC EMPLOYEES FOR ENVIRONMENTAL, RESPONSIBILITY; RESOURCES FOR SUSTAINABLE COMMUNITIES; CITIZENS FOR A HEALTHY BAY; and WASHINGTON ENVIRONMENTAL BALANCE, INC.,	)	Nos. 02-162, 02-163, and 02-164
and	)	APPELLANTS PUGET SOUNDKEEPER ALLIANCE, ET AL'S MOTION FOR SUMMARY JUDGMENT
THE BOEING COMPANY,	)	**ORAL ARGUMENT REQUESTED**
and	)	
SNOHOMISH COUNTY,	)	
Appellants,	)	
v.	)	
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and TOM FITZSIMMONS, its Director	)	
Respondent,	)	
and	)	
ASSOCIATION OF WASHINGTON BUSINESS,	)	
Intervenor.	)	

I. INTRODUCTION

Appellants Puget Soundkeeper Alliance, Waste Action Project, Washington Public Employees for Environmental Responsibility, Resources for Sustainable Communities, Citizens for a Healthy Bay, and Washington Environmental Balance, Inc. (collectively, the "Alliance") hereby move for summary judgment on several issues encompassed by legal issues nos. 5, 6, and 8 as identified by the Prehearing Order.

The Alliance should prevail in this motion under the standard of review previously recognized by the Board because the challenged Industrial Stormwater General Permit ("ISGP") is not "consistent with the applicable legal requirements." *Puget Soundkeeper Alliance, et al. v. Ecology,* PCHB No. 00-174 (Order On Motion For Summary Judgment, Aug. 29, 2001) at n. 2. Rather than ensuring that industrial stormwater dischargers comply with water quality standards, the ISGP provides compliance off-ramps in an endless "compliance schedule" for discharges of pollutants of concern to 303(d)-listed waterbodies — the very waterbodies that need the most protection — and by allowing virtually any permittee that checks a box and signs a form to have a "standard mixing zone." These provisions are repugnant to the purposes of the Clean Water Act ("CWA") and state water quality law, as well as flatly illegal under applicable regulations. Furthermore, the ISGP violates regulations applicable to general permits by explicitly providing that Ecology can waive compliance with permit conditions through unspecified written authorization. Summary judgment is appropriate because there are no genuine issues of material fact and the Alliance is entitled to judgment as a matter of law. WAC 371-08-300; CR 56(c).

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II. FACTUAL BACKGROUND

A. Industrial Stormwater

"Stormwater runoff is one of the most significant sources of water pollution in the nation, 4 at times comparable to, if not greater than, contamination from industrial and sewage sources." *Environmental Defense Center v. USEPA,* 319 F.3d 398, *4 (9th Cir. 2003) (internal quotation marks and citations omitted).

> The volume and quality of storm water discharges associated with industrial activity will depend on a number of factors, including the industrial activities occurring at the facility, the nature of precipitation, and the degree of surface imperviousness. Rain water may pick up pollutants from structures and other surfaces as it drains from the land. In addition, sources of pollutants other than storm water, such as illicit connections, spills, and other improperly dumped materials may increase the pollutant loads discharged from separate storm sewers. The sources which contribute pollutants to storm water discharges differ with the type of industry operation and facility-specific features. For example, air emissions may be a significant source of pollutants at some facilities, material storage operations may be important at different operations, while other facilities may discharge storm water associated with industrial activity with relatively low levels of pollutants.
>
> The most extensively studied storm water discharges have been those from residential and commercial areas (urban runoff). Evaluating these discharges will provide a starting point for understanding the pollutants that can be expected in storm water discharges associated with industrial activity. Many storm water discharges are expected to contain the pollutants typically associated with urban runoff, along with additional pollutants that result from the specific industrial operations of the facility.

58 Fed.Reg. 61,146, at 61,153-54 (Nov. 19, 1993) (citations omitted).

> Storm water runoff from lands modified by human activities can harm surface water resources and, in turn, cause or contribute to an exceedance of water quality standards by changing natural hydrologic patterns, accelerating stream flows, destroying aquatic habitat, and elevating pollutant concentrations and loadings. Such runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients (phosphorous and nitrogen), heavy metals and other toxic pollutants, pathogens, toxins, oxygen-demanding substances (organic material), and floatables. After a rain, storm water runoff carries these pollutants into nearby streams, rivers, lakes, estuaries, wetlands, and oceans. The 2 highest concentrations of these contaminants often are contained in 'first flush' discharges, which occur during the first major storm after an extended dry period. Individually and combined, these pollutants impair water quality, threatening designated beneficial uses and causing habitat alteration or destruction.

64 Fed.Reg. 68,721, 68,724 (Dec. 8, 1999) (citations omitted).

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B. The Challenged Industrial Stormwater General Permit

Ecology issued the challenged ISGP on August 21, 2002, with a September 20, 2002, effective date. Exh. A. This is Ecology's fourth iteration of this permit since 1992, and resulted from the settlement of the Alliance's appeal of the 2900 version. Exh. B (Fact Sheet) at 1 and 2. The ISGP is a general permit that provides coverage for approximately 1,300 industrial facilities across Washington where precipitation or runoff may contact industrial activities or materials and result in discharge of contaminated stormwater. *Id* at 3. The Fact Sheet describes the several various types of industrial facilities that maybe covered under the ISGP, the common sources of contamination at these facilities, and the pollutants that may be present in their stormwater discharges. *Id* at 6 — 14.

Similar to its previous iterations, a core requirement of the ISGP is the development and implementation of a permittee's stormwater pollution prevention plan ("SWPPP"), which is essentially to describe potential contaminant sources, best management practices ("BMPs") (to be derived from Ecology's Stormwater Management Manual for Western Washington or an equivalent manual), and mechanisms relating to implementation of BMPs. Exh. A at 35-42. New in this ISGP are requirements for sampling and analysis of stormwater discharges, as well as reporting of sample results (S4. and S5.); objective requirements to meet water standards, both narrative (S7.) and, for discharges to 303(d)-listed waters and from certain 2 discharger categories, numerical (S3.); a compliance schedule for permittees who cannot meet -' numeric effluent limitations for discharges to 303(d) listed waters (S3.D.2.); provisions for allowance of standard and expanded mixing zones (S3.E.); "benchmarks" that are not effluent limitations but guideposts for monitoring requirements and relief therefrom (S4.C. and D.); and a provision for "no exposure" opt out of permit coverage. Exh. A at 14-33.

III. ARGUMENT

A. The S3.D.2. "compliance schedule" is inconsistent with applicable law.

The ISGP establishes numeric effluent limitations for discharges of pollutants of concern to 3 03(d) listed, or "impaired", waterbodies, but provides that a discharge exceeding such limitations is not a permit violation but instead automatically places the offending permittee into a compliance schedule. Exh. A at 17-19. This "compliance schedule" is really a way out of

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compliance with the effluent limitations — in substance, the schedule requires nothing more than what the permit otherwise requires of all permittees and there is no end date when the discharge must finally comply. This schedule violates applicable regulations dictating that compliance schedules expeditiously lead to actual compliance, requiring Ecology oversight, and mandating permittee submission of certifications of compliance. In addition, the CWA itself prohibits this compliance schedule.

1. Condition S3 .D.2. — the noncompliance schedule

303(d)-listed or impaired waterbodies are those where, as determined by Ecology, standard effluent limitations "are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(l)(A). Accordingly, ISGP Condition S3.D.establishes numeric effluent limitations for discharges of pollutants of concern to impaired waterbodies at the "water quality standards for the named pollutant(s) at the point of discharge." Exh. A at 17, 18. Alternatively, the numeric effluent limitation is "as identified in [a] TMDL or [303(d)] listing determination." *Id* Such numeric effluent limitations are appropriate to ensure that regulated discharges "comply strictly" with water quality standards. 33 U.S.C. §§ 1342(a)(1) and (p)(3)(A), 131 l(b)(1)(C); *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1165 (9th Cir. 1999); *Puget Soundkeeper Alliance, et al. v. Ecology.* PCHB No. 00-174 (Order Granting Partial Stay, Aug. 29, 2001) at *5-6; see also,* 40 C.F.R. §§ 122.4(d) and 122.44(d)(1); WAC 173-201A-160(3); *Airport Communities Coalition v. Ecology,* PCHB No. 01-160 (Findings Of Fact, Conclusions Of Law, And Order, Aug. 12, 2002) at 110.[1]

However, for "existing facilities," those that were in operation before the August 2002 issuance of the ISGP, whether or not they were previously permitted or are just now receiving coverage for the first time, an exceedence of the numeric effluent limitation is not a permit violation.[2] Exh. A at 10, 18 and 57; Exh. E (Johnson Depo. Transcript[3]) at 31(1.6-11), 38(1.22) — 39 (1.2), and 40 (1.25) — 41 (1.6). Instead, if the permittee fails to comply with the S3.D.2.

[1] No mixing zone are allowed for discharges of pollutants of concern to impaired waterbodies because, as Ecology noted in its Responses To Comments, "no dilution is available because the receiving water already exceeds water quality standards." Exh. C (Responses to Comments) at 22; *see also,* Exh. D (EPA 24 Reg. 9 letter of Nov. 12, 1999) at 2 and 5.

[2] "Existing facilities" that had permit coverage, but allowed it to lapse, are considered "new facilities" and are not eligible for the S3.D.2. compliance schedule. Exh. A at 10 and 17--18; Exh. E at40 (1.21— 24).

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numeric effluent limitations, the compliance schedule "immediately becomes applicable and shall be considered the applicable interim effluent limitations until compliance with water quality standards is achieved or a TMDL is completed." Exh. A at 18.

The "compliance schedule" involves six steps: Step 1) within one year of exceedence of the effluent limitation, the permittee must look for potential pollutant sources and identify source control and treatment options and implement "any nonstructural source control options that have been identified"; Step 2) step two is of indefinite length and involves only monitoring; Step 3) the permittee must implement "structural source control options" within one year of advancing from step 2; Step 4) step four is of indefinite length and involves only monitoring; Step 5) the permittee must implement the treatment option within one year of advancing from step four; Step 6) step six involves only monitoring. Exh. A at 18-19. The permit does not contemplate any Ecology selection or approval of the pollution control measures to be implemented under the compliance schedule. *Id.;* Exh. E at 34 (1.1 8-25).

Notably, the S2.D.2. compliance schedule establishes no date or endpoint at which compliance with the numeric effluent limitations is required. Exh. A at 18-19. Although a permittee in the compliance schedule "exits" it and goes back to the numeric effluent limitations if it has "eight consecutive samples that do not exceed the applicable water quality standard for the listed pollutant(s)", this permittee simply goes back to step one of the compliance schedule if it later again exceeds the numeric effluent limitations. *Id.* at 18; Exh. E at 32 (1.18)-33 (1.9). Thus, the S3.D.2. "compliance schedule" is indefinite in duration and infinite in postponing enforceable compliance with the underlying numeric effluent limitation. Exh. E at 40 (1.1-7).

As Ecology Southwest Regional Office industrial stormwater inspector Marilou Pivorotto complained, the S3.D.2. compliance schedule "looks good on paper, kind of, a nice little thing that we have on paper", but is practically unworkable. Exh. F at 56 (1.23-25). According to Ms. Pivorotto, the steps of the compliance schedule are vague and there is too much time given for each one. *Id.* at 53 (1.18-24) and 55 (1.5-12). She pointed out that steps one and two of the compliance schedule, calling for identification of potential pollutant sources and "nonstructural source control options" and then monitoring of results, are things already required of all

[3] Keith Johnson was deposed on Jan. 7, 2003, as Ecology's Rule 30(b)(6) designee. Exh. E at 7(1.16 – 8(1.21). Mr. Johnson's testimony is therefore Ecology's testimony as to the intent of the permit. Id.; CR 30(b)(6).

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permittees under the ISGP. *Id.* at 54(1.3-24); Exh. A at 19 and 37-41. Indeed, the ISGP also already requires all permittees to implement "structural source control BMPs" and "treatment BMPs", the same things required by steps 3 and 5 of the compliance schedule, whenever necessary to "maintain compliance with water quality standards." Exh. E at 34 (1.1-17) (Ecology testimony that S9. provides the definitions for "structural source control options" and "treatment options" as used in S3 .D.2.); Exh. A *(compare* step 3 and step 5 requirements on p. 19 *to* S9.B.3.b. and c. SWPPP requirements on p. 41). Especially in light of this, Ms. Pivorotto's concern about us~ of the compliance schedule to postpone implementation of facility improvements seems warranted. Exh. F at 55 (1.5-11). Based on her three and a half years of experience and approximately 700 inspections of industrial stormwater dischargers, Ms. Pivorotto testified that it would be difficult to determine where in this compliance schedule a given permittee would be and that a better system would be to individual compliance schedules 26 tailored to individual permittees. Exh. F. at 11(1.15-17); 20(1.19), 51(1.3-14), and 57 (l.21)—59 (1.24).

Not only are all the source control, structural control, and treatment BMPs called for by the S3.D.2. compliance schedule already required of all permittees under S9.3., but they have essentially been required of all permittees under the two previous permits since 1995. Exh. G at 15-20 (note requirements for selection of BMPs from Ecology's stormwater management manual at 15 and "Additional BMPs to Reduce Pollutants Below a Significant Amount" at 19); Exh. H at 15-20. As Ecology Southwest Regional Office enforcement officer Marc Pacifico wrote about the S3.D.2. compliance schedule in his comments on the draft ISPG:

> **Five years can go by without ever getting a facility discharge to meet water quality standards. This appears to be a 'compliance off ramp" for existing facilities that should already have had these BMPs in place for years under the previous permit.**

Exh. I at 2 (emphasis added).

2. S3.D.2. is inconsistent with regulations on compliance schedules

The compliance schedule in Condition S3 .D.2. is inconsistent with legal requirements for compliance schedules in at least three ways:

a) *The compliance schedule does not require compliance with the effluent limitations.* The compliance schedule includes no final date by which the permittee must meet

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the effluent limitations. Exh. A at 18-19. If the permittee does meet the effluent limitations for eight consecutive monitoring periods during the compliance schedule, the compliance schedule ends and the permittee is again required to meet the effluent limitations. *Id.;* Exh. E at 32 (1.18)-33 (1.9). However, if such a permittee again violates the effluent limitations, the permittee simply goes back to step one of the compliance schedule. Exh. A at 18-19; Exh. E at 32 (1.18)—33 (1.9). The compliance schedule is thus designed to avoid ever imposing an enforceable requirement that permittees meet the effluent limitations — it is in effect a noncompliance schedule.

This violates federal and state regulations specifically applicable to compliance schedules. EPA's regulation states that "[a]ny schedules of compliance under this section *shall require compliance* as soon as possible, but not later than the applicable statutory deadline under the CWA." 40 C.F.R. § 122.47(a)(1) (emphasis added). Condition S3.D.2. does not ever "require 8 compliance", never mind "as soon as possible", or even "not later than the applicable statutory deadline," as discussed below in reference to 33 U.S.C. § 1342(p)(4)(A).

State regulations provide that compliance schedules "shall be developed *to ensure final compliance with all water quality-based effluent limits* in the shortest practicable time" and only as necessary *to achieve compliance with applicable effluent standards and limitations..*[4]. WAC 173-201A-160(4)(a) (emphasis added) and WAC 173-226-180(1) (emphasis added). In contrast, S3.D.2. ensures only that "final compliance with all water quality-based effluent limits" is *never* required of permittees.

b) The S3.D.2. compliance schedule is inconsistent with state regulations because it does not contemplate or require selection or approval of pollution control measures by Ecology. The compliance schedule leaves selection of first "nonstructural source control options", then "structural source control options", followed finally by "treatment options" entirely to the permittee. Exh. A at 19; Exh. E at 34 (1.18) —35 (1.20). When a permittee applies BMPs as the permit generally requires and a violation of water quality criteria occurs (such as is indicated when the S3 .D.2. effluent limitations are violated), Ecology's regulations require that the permittee "shall modify existing practices or apply further water pollution control measures, *selected or approved by the department,* to achieve compliance with water quality criteria."

[4] The numeric effluent limitations in S3.D. are water quality based effluent limitations. Exh. E at 75 (1.16-24).

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WAC 173-201A-160(3)(b) (emphasis added); *see also, Environmental Defense Center,* 319 F.3d at * 62 — 68 (leaving selection of BMPs to discharger without agency oversight is failure to regulate in violation of CWA). The S3.D.2. compliance schedule addresses exactly the same circumstance contemplated by WAC 173-201A-160(3)(b), but it does not involve any selection or approval by Ecology of the "further water pollution control measures" to be implemented to achieve compliance with effluent limitations. The compliance schedule is inconsistent with Ecology's regulations because it allows permittees that fail to meet water quality criteria to determine on their own how to address facility pollution problems — or, at least, how to meet the terms of the compliance schedule — without the Ecology oversight expressly contemplated by the regulations.

Meeting these regulatory requirements would help address Ms. Pivorotto's concerns about the interpretation, duration and oversight difficulties inherent in the S3.D.2. compliance schedule. Exh. F at 51(1.3) —59 (1.24).

c) The Condition S3.D.2. compliance schedule is inconsistent with applicable regulations because it does not require permittees to provide written notice of their compliance or noncompliance with its requirements.

Under the compliance schedule, monitoring reports must be submitted quarterly (S5.A.), a "full report of findings and actions taken" must be submitted at the end of the step 1 first year, monitoring results and "conclusions" must be submitted at the end of each year of steps 2 and 4, and a "report of actions taken" must be submitted at the end of a year in step 3 and again at the end of a year in step 5. Exh. A at 19. Nowhere does S3.D.2. require the permittee to state in writing whether it is in compliance or not in compliance with the provisions of the compliance schedule. *Id.* at 18-19.

This is contrary to both federal and state regulations. EPA regulations require, within 14 days of each interim date and the "final date of compliance", that "the permittee *shall notify the Director in writing of its compliance or non-compliance with the interim or final requirements*." 40 C.F.R. § 122.47(a)(4) (emphasis added). Similarly, Ecology's regulations require that "[e]ither before or up to fourteen days following each interim date and the final date of compliance, the permittee *shall provide the department with written notice of the permittee's compliance or noncompliance with each interim or final requirement."* WAC 173-226-180(4)

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(emphasis added). To satisfy these regulations, the ISGP must require the permittee to explicitly state whether it is in compliance or noncompliance with each requirement of the compliance schedule. It does not. Exh. A at 18-19.

3. The S3.D.2. compliance schedule is inconsistent with the CWA.

S3.D.2. is inconsistent with CWA Section 402(p)(4)(A), which explicitly limits compliance schedules for industrial stormwater discharges:

> Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

33 U.S.C. § 1342(p)(4)(A) (emphasis added).

The word "compliance" in this subsection refers to compliance with the "permit requirements" identified in the immediately preceding applicable section, § 1342(p)(3)(A). This subsection, in turn, requires strict compliance with water quality standards, which is here implemented by the numeric effluent limitations in S3.D.2. *Defenders of Wildlife,* 191 F.3d at 1164-65. § 1 342(p)(4)(A) plainly contemplates such compliance to have been required by February 4, 1995, three years after the date by which all permits were to be issued.

EPA's regulation on this provision limits the availability of a three-year compliance schedule to meet permit conditions to "initial permits." 40 C.F.R. § 122.42(d).[5]

The phrase "such permit" in the last sentence of33 U.S.C. § 1342(p)(4)(A) refers either to any permit for industrial stormwater discharges or, as implied by EPA's regulation, to the initial permit for any given stormwater discharge. Either way, the S3.D.2. compliance schedule is inconsistent with this CWA requirement.

If "such permit" in § 1342(p)(4)(A) means any permit, then S3.D.2. is impermissible because it does not require compliance within three years of the permit issuance date.

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[5] The regulation states:

> The initial permits for discharges composed entirely of storm water issued pursuant to § 122.26(e)(7) of this part shall require compliance with the conditions of the permit as expeditiously as practicable, but in no event later than three years after the date of issuance of the permit.

40 C.F.R. § 122.42(d).

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If "such permit" in this subsection means only an initial permit for a given stormwater discharge, then only facilities whose stormwater discharges had not been previously covered by an NPDES permit can have a compliance schedule, which must require compliance within years of the August 2002 permit issuance date. Permittees for whom the challenged ISGP is not their "initial permit" may not have a compliance schedule at all. To interpret 33 U.S.C. § 1342(p)(4)(A) otherwise would render it nonsensical. Given that compliance with water quality standards is a statutory permit requirement under 33 U.S.C. § I 342(p)(3)(A), as decided by the Ninth Circuit in *Defenders of Wildlife,* 191 F.3d.at 1164-65, and that the CWA prohibits backsliding under 33 U.S.C. § 1342(o) *(see especially* § 1342(o)(3)), it would be contrary to the intent and structure of the CWA to interpret § 1342(p)(4)(A) to allow compliance schedules in later permits after compliance schedules in initial permits were limited to three years. To do so would be backsliding in violation of 33 U.S.C. § 1342(o).

B. The ISGP's provisions for standard mixing zones is inconsistent with applicable law.

The provisions for standard mixing zones in the ISGP are inconsistent with applicable law because they circumvent regulatory safeguards on mixing zone allowances and depend on a demonstrably false assumption about permittee compliance with BMP and SWPPP requirements. Specifically, the ISGP provides for the default grant of a mixing zone following a permittee's application for one without any requirement that Ecology make the determinations that the mixing zone regulation demands of it, including a determination that AKART has been fully implemented. In addition, the uniform sizing of the standard mixing zones is contrary to the provisions of the mixing zone regulation designed to minimize mixing zone size and account for mixing zone overlap.

1. WAC 173-201A-l00 — the mixing zone regulation

It is important to note that while the CWA includes in its objectives a "national goal that the discharge of pollutants into the navigable waters be eliminated" and a "national policy that the discharge of toxic pollutants in toxic amounts be prohibited", as well as a National Pollutant Discharge *Elimination* System to attain CWA objectives, it nowhere mentions, or even contemplates, the incorporation of mixing zones into state water quality standards. 33 U.S.C. §§

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1251 and 1342. Nonetheless, the granting of mixing zones is included in Washington State's regulatory chapter on water quality standards, ostensibly to consider the effects of dilution when determining whether any given discharge causes or contributes to violation of water quality standards. WAC 173-201A-100.

Ecology's mixing zone regulation consists of a fairly vigorous array of procedural and substantive safeguards to ensure that mixing zones are not used excessively to thwart the goals of the CWA and state water pollution control law. *Id.* The size and location of a mixing zone can be described in a permit or order. WAC 173-201A-100(1). Full application of AKART must be required of a discharger before a mixing zone can be authorized. WAC 173-201A-100(2). Before granting a mixing zone, Ecology must determine "that the *supporting information clearly indicates* the mixing zone would not have a reasonable potential to cause a loss of sensitive or important habitat, substantially interfere with the existing or characteristic uses of the water body, result in damage to the ecosystem, or adversely affect public health." WAC 173-201A-100(4) (emphasis added). In making a mixing zone determination, Ecology *"shall consider* critical discharge conditions". WAC 173-201A-l00(3) (emphasis added).

"The size of a mixing zone ... shall be minimized." WAC 173-201A-l00(6) (emphasis added). In addition, mixing zones are generally subject to strict size limitations based on the category of the receiving waters and restrictions on acute criteria exceedences as demonstrated by modeling. WAC 173-201A-100(7) and (8). Overlap of mixing zones in close proximity is also limited to circumstances where "the separate and combined effects of the discharges can be reasonably determined ... [to] not create a barrier to the migration or translocation of indigenous organisms to a degree that has the potential to cause damage to the ecosystem." WAC 173-201A-100(9)(a). However, stormwater discharges (that do not contain "process wastewater") may be granted an exemption from the restrictions of WAC 173-201 A-100(7), (8) and (9) if the discharger *"clearly demonstrates"* that AKART has been applied to the discharge and that the discharge will not have specified environmental effects. WAC 173-201 A- 100(10)(b) (emphasis added). Furthermore, mixing zones for stormwater discharges must "be based on a volume of runoff corresponding to a design storm approved by the department." WAC 173-201A-100(10)(c).

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2. Standard mixing zones under the ISGP

ISGP condition S3.E. provides for allowance of a "standard mixing zone" of fixed size assertedly provided that the requirements of S3.E.1. are met. Exh. A at 19-21. The S3.E.1. requirements mirror the requirements of WAC 173-201A-100(2), (4), and (10)(b) and further limit mixing zone applicability to situations where "[t]he pollutant is not subject to 303(d) listing at the point of discharge to a listed segment/grid" and "[t]he receiving waterbody does not have a control plan[6] that would limit available dilution." *Id.* at 20. S3.E.2. establishes the sizes of standard mixing zones based on receiving water type. *id.* at 20-21. For three of the four categories — streams and rivers, estuaries, and oceanic — the standard mixing zone sizes correspond to the *maximum* mixing zone sizes set out in WAC 173-201A-100(7). *Id.* at 20. WAC 1 73-201A-l00(10) is presumably here purportedly applied to exempt these standard mixing zones from the size and overlap criteria of WAC 173-201A-100(7), (8), and (9).

How a permittee may obtain a standard mixing zone depends to a limited extent on the permittee's status. Dischargers under permit on the effective date of the ISGP (who are automatically covered under the ISGP without submission of a new application and who are required to instead submit "a completed identification of receiving waterbody and declaration of mixing zone form" (S2.B.1.)) need only "certify on the Identification of Receiving Waterbody and Declaration of Mixing Zone form that they meet the mixing zone applicability requirements listed [in] 53.E.l." *Id.* at 9 and 19-20. This form, in relevant part, requires only a certification by the permittee that the S3.E.l. requirements are met. Exh. J. The mixing zone for these existing permittees becomes effective immediately upon coverage or submission of the form, whichever is later, without any determination, notification, or other action by Ecology. Exh. E at 80 (1.21)— 21 81(1.13). There is no provision for public notice or opportunity for public review for these standard mixing zones for existing dischargers. *Id.* at 81(1.22) — 82 (1.7).

Other permittees, those who were not covered under the previous permit, can request a standard mixing zone during application for coverage or through modification of coverage by completing the "Mixing Zone Applicability" portion of the permit application. Exh. A at 19. This is again a form on which the permittee checks a box and certifies that it meets the

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requirements of S3 .E.1. Exh. K. For these permittees, before the mixing zone becomes effective, the public notice requirements of S2.D. must be satisfied. Exh. A at 11. However, upon expiration of the public comment period and when permit coverage becomes effective, the standard mixing zone is automatically granted without any determination, notification, or other action by Ecology. Exh. A at 19. In granting standard mixing zones under the ISGP, Ecology merely accepts the permittee's word, indicated by the checking of a box and the signing of a form, that the prerequisites for a mixing zone derived from WAC 173-20 1 A-100 are satisfied. Exh. E at 78 (1.23) — 80 (1.1). Ecology makes no site inspection, no review of a permittee's records, and no inquiry to verify or confirm the permittee's statements are made by Ecology before granting a standard mixing zone in this "check the box and sign the paper" scheme. *Id.* at 80 (1.2 —20). In issuing these standard mixing zone authorizations, Ecology makes no independent evaluation of the discharge and its environmental impact — there is no Ecology consideration of critical discharge conditions, the extent to which the requested mixing zone overlaps with other mixing zones, the existence of other mixing zones in the area, the size and flow characteristics of the receiving waters, or the discharge volume corresponding to the design storm. Exh. E at 83 (1.12-24), 85 (1.13) — 88 (1.2). In the permit, forms, and related documents, Ecology does not provide any guidance to permittees seeking standard mixing zones about how to evaluate whether they meet the applicable standards as described by the standard mixing zone forms. *Id.* at 98 (1.14) —99(1.8).

3. The standard mixing zone scheme is inconsistent with applicable law.

With the standard mixing zone scheme, Ecology attempts to write its duty to make determinations about environmental effects before granting mixing zones *out* of WAC 173-201A-l00. Having a permittee check a box indicating that it meets criteria based on the regulatory requirements for a mixing zone is not sufficient to satisfy a regulation that clearly contemplates determinations by Ecology that such criteria are met.[7] Under WAC 1 73-201A-

[6] "Control plans may be total maximum daily load (TMDL) determinations, restrictions for the protection of endangered species, ground water management plans, or other limitations that regulate or set limits on discharges to a specific waterbody or groundwater recharge area."

[7] The ISGP also provides that a permittee may apply for an "expanded mixing zone," but the standard mixing zone forms may not be used for this. Exh. A at 11 (S2.B.5.c.) and 21 (S3.E.3.); Exh. B at 24. It appears that Ecology will actually review information submitted by permittees seeking "expanded mixing zones" and these will be allowed only after Ecology affirmatively determines that the requirements of WAC 173-201A-l00 are satisfied and after

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100(4), "supporting information" must "clearly indicate" that environmental criteria are met.[8] A *clear demonstration* of the absence of adverse affects is also required by WAC 173-201A-100(10)(b) before an exemption to the size and overlap criteria can be granted. The ISGP's "check the box and sign the paper" scheme cannot satisfy these requirements, especially in light of Ecology's estimate that "at least 10% to 15%" of permittee discharges are likely to cause "measurable environmental problem[s]." Exh. B at 16. There is no way that the scant information provided by a permittee on these mixing zone forms can be said to "clearly indicate" or "clearly demonstrate"[9] that the mixing zone would not damage the ecosystem, interfere with uses, or "have a reasonable potential to cause a loss of sensitive or important habitat." WAC 173-201A-l00(10)(b); *see,* Exhs. J and K. Nor does the information provided on the mixing zone form allow an Ecology determination that "consider[s] critical discharge conditions." WAC 173-201A-l00(3).

In granting standard mixing zones, Ecology also takes the permittee's word that AKART has been fully applied — that "the facility has prepared and implemented a [SWPPP] consistent with permit requirements" and that "all appropriate [BMPs] established for stormwater pollutant control associated with their industry as identified by Ecology's stormwater management manual have been applied to the discharge" — without any independent evaluation. Exh. E at 86 (1.13-17); Exh. J at 2; Exh. K at 2. This is nothing short of astounding because of the extremely low 14 observed rates of compliance with permit BMP and SWPPP requirements. Inspector Pivorotto testified that only about <u>one in ten</u> of the permittees she has visited have fully implemented BMPs and met the SWPPP requirements of the permit. Exh. F at 16 (1.17) — 17 (1.12) and 19 (1.1) —22 (1.24). Former Ecology stormwater inspector Mak Kauffman testifies to similar rates of compliance. Declaration of Mark Kauffman ¶¶ 2-8. Indeed, even in the fact

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compliance with public notice and comment procedures for 24 permit modification. For these reasons, the Alliance does not here object to the provisions for "expanded mixing zones."

[8] In a normal case of a mixing zone for an individual permit, Ecology requires a site visit to verify that the WAC 173-201A-l00 conditions prerequisite to a mixing zone are met. Exh. E at 71(1.10) —73 (1.18); Declaration Of Mark Kauffman, Exh. 1.

[9] Merriam-Webster Collegiate Dictionary: "Demonstrate" means — "1 : to show clearly 2 a : to prove or make clear by reasoning or evidence b : to illustrate and explain especially with many examples." Black's Law Dictionary (Abr. 6th ed.) — Demonstrate means "To teach by exhibition of samples; to derive from admitted premises by steps of reasoning which admit of no doubt; to prove indubitable. To show or prove value or merits by operation, reasoning, or evidence."

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sheet for the challenged permit Ecology recognizes the low rates of compliance with these BMP and SWPPP requirements:

> Facility inspections have revealed that many facilities with permit coverage are not in compliance with permit provisions. The stormwater pollution prevention plan (SWPPP) is a critical permit requirement, identifying how stormwater at a facility will be managed to prevent stormwater pollution. However, it is estimated that as recently as August 2001, only about half of the facilities with permit coverage could locate their SWPPP during an Ecology inspection. Even fewer had a SWPPP that was kept up-to-date and fully implemented. Best management practices (BMPs) are required by the permit to prevent stormwater pollution. Based on site inspections, about 60% to 70% of the facilities could identify one or more BMPs that were maintained to manage stormwater, but no more than 25% would be considered in full compliance with permit BMP requirements. It is estimated that at least 10% to 15% of the permitted facilities have a stormwater discharge that is likely to be causing a measurable environmental problem.

Exh. B at 15-16; *see also,* Exh. E at 88 (1.5) —93 (1.7).

Faced with the inconsistency between observed rates of AKART implementation and its exclusive reliance on permittee statements that all BMPs and SWPPP requirements are implemented in this standard mixing zone scheme, Ecology's designee could only testify that "[i]t is not [Ecology's] policy to call people liars" and that Ecology "hopes" that permittees seeking standard mixing zones have done what they are supposed to. Exh. E at 93 (1.21) —94 (1.13). To the contrary, Ecology's assumption that all permittees who check the box and thereby claim to have fully implemented AKART in their requests for standard mixing zones is patently unreasonable and contrary to experiences and opinions of Ecology inspectors. There is no way in these circumstances that a permittee's assurance that it has implemented AKART can satisfy the regulatory requirements requiring full AKART implementation and that "the discharger clearly demonstrate" that all appropriate BMPs have been applied. WAC 1 73-201A-l00(2) and (l0)(b)(i).

Indeed, Ms. Pivorotto testified about seven permittees that had not fully implemented BMPs and permit SWPPP requirements when she last visited and inspected them at various times within the past year. Exh. F at 68 (1.4)— 85 (1.2l)[10] Ms. Pivorotto testified that, as far as

[10] These seven are Prudhoe Bay Freight Lines, Allen Brown Wood Waste. UPS Chehalis, Weyerhaueser Aviation Chehalis, Sorenson Transport Company, Inc., Northwest Forest Fiber Products, WKO Sawmill, and High Cascade Veneer. Inspection reports for these facilities presented to Ms. Pivorotto at her deposition were samples of many reviewed by the Alliance's counsel. Declaration of Richard Smith ¶ 2-3. No attempt was made by the Alliance to find every industrial stormwater discharger who had not fully implemented AKART as indicated by inspection

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she is aware, none of these facilities had made changes to fully comply with permit AKART requirements since her most recent visits. *Id.* In one instance, she "know[s] for a fact" that the permittee had not implemented appropriate BMPs as of her March 12, 2003, deposition. *Id.* at 85 (1.14 — 21). All of these permittees have checked the box on forms submitted to Ecology and so requested standard mixing zones. Exh. L. In accordance with the procedures described by Ecology's 30(b)(6) designee, standard mixing zones have been or will be granted to these seven permittees because they checked the box and signed the form. Exh. E at 78 (1.23)— 80 (1.1). These seven serve as examples of the failure of the ISGP standard mixing zone scheme to satisfy the requirements of WAC 173-201A-l00(2) and (l0)(b)(i).

Finally, the standard mixing zone provisions are contrary to the regulatory requirement that the size of a mixing zone be minimized. WAC 173-201A-l00(6). This regulatory requirement cannot be met by the granting of uniform mixing zones at or near the maximums allowed by the sizing criteria in WAC 173-201 A-100(7). Furthermore, the standard mixing zone sizes have been set at these maximum sizes without consideration of the volume or runoff corresponding to any design storm as required by WAC 173-201A-l00(l0)(c).

WAC 173-201A-l00 requires that Ecology make an individual determination on the satisfaction of regulatory safeguards for the receiving waters and on mixing zone sizing before authorizing a mixing zone. Nothing in the regulations allows Ecology to ignore or bend these rules in the context of a general permit for Ecology's convenience or for any other reason. Ecology may authorize mixing zones in conjunction with this permit, but it must do so in a manner that complies with applicable regulations.

C. The ISGP is inconsistent with regulations when it allows permittees to act inconsistently with permit conditions.

In several of its conditions, the ISGP allows permittees to postpone and potentially escape compliance with permit requirements if Ecology so authorizes "in writing," without regard to permit modification or any other formal process. This is inconsistent with applicable requirements on general NPDES permits.

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reports or other information in Ecology's files. *Id.* These seven were selected as part of a manageable number of similarly situated facilities for purposes of example only. *Id.*

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A prominent provision of Ecology's regulation on general permits states, "[a]ll discharges authorized by the general permit shall be consistent with the terms and conditions of the permit." WAC 173-226-080(1)(a). Logically, this restriction on "all discharges" extends at least to the primary mechanisms and safeguards included in a general permit to control the characteristics of these discharges.

In several instances, the ISGP sets conditions important to the control of the discharges it regulates, but states that a permittee can be relieved of the its obligation to comply with the condition as set forth in the ISGP if Ecology authorizes otherwise in an unspecified writing:

1) For a class of permittees, "[u]nless otherwise authorized by Ecology in writing, the [SWPPP] must be completed and submitted to Ecology by March 10, 2003." Exh. A at 11-12 (S2.C.2.a.).

2) For this same class of permittees "[u]nless otherwise authorized by Ecology in writing, implementation of non-capital [BMPs] must be completed by May 10, 2003. BMPs that require a capital investment must be completed by November 10, 2003, unless otherwise authorized by Ecology in writing." *Id.* at 12 (S2.C.2.b.).

3) For another class of permittees, "[u]nless otherwise authorized by Ecology in writing, the [SWPPP] must be completed and submitted to Ecology within 30 days of receiving coverage." *Id.* at 12 (S2.C.3.a.).

4) For this same class of permittees, "[u]nless otherwise authorized by Ecology in writing, implementation of non-capital [BMPs] must be completed within 90 days of receiving coverage. BMPs that require a capital investment must be implemented within nine (9) months of receiving coverage unless otherwise authorized by Ecology in writing." *Id.* at 12 (S2.C.3.b.).

5) For inactive and unstaffed permittee facilities, "[v]isual monitoring can only be suspended if authorized in writing by Ecology." *id.* at 22 (S4.B.1.).

6) If visual monitoring reveals an illegal, nonstormwater discharge, "[t]he permittee shall eliminate the illicit discharge within 30 days unless additional time is authorized in writing by Ecology." *id.* at 23 (S4.C.l.).

7) For all permittees, methods for sample analysis "shall conform to" alternative specified guidelines, "unless otherwise specified in this permit or approved in writing by [Ecology]." *Id.* at 29 (S4.H.).

Ecology has no particular form that will be used to make such "other authorizations in writing." Exh. E at 119 (1.8-11). The "other authorization in writing" need not be made by Ecology staff with any particular signature authority and Ecology anticipates that these authorizations will be made at the inspector level. *Id* at 119 (1.10-18). Ecology will give no

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public notice or opportunity for comment on these "other authorizations in writing," and will not follow permit modification procedures. *Id.* at 120 (1.8) — 121(1.17).

The seven provisions at issue are inconsistent with WAC 173-226-080(1)(a) because they allow permittees to discharge in a manner that is not "consistent with the terms and conditions of the permit." WAC 173-226-080(1)(a). The ISGP otherwise requires SWPPP and BMP implementation requirements to be met on a certain schedule, monitoring activities to be conducted in a certain fashion, and illicit discharges to be eliminated within a specified time. These are the "terms and conditions of the permit" that have gone through the general permit issuance procedures, including public notice and comment. For the permit to provide that these terms and conditions can be effectively modified or even removed[11] in a letter, inspection report, handwritten note, or other unspecified writing by unspecified Ecology staff is contrary to WAC 173-226-080(1)(a).

These provisions also run afoul of EPA's regulation on permit modification. All changes to NPDES permits after issuance, except for those characterized as "minor modifications" under 40 C.F.R. § 122.63, must follow the procedures for permit modification in 40 C.F.R. § 122.62 and § 124.5. None of the seven "unless otherwise authorized by Ecology" provisions concerns a change to the conditions as applicable to the individual permittee receiving the "otherwise authorization" that can be fairly characterized as a minor modification. 40 C.F.R. § 122.63. Therefore, to legally modify the conditions of a permittee's coverage under the ISGP to effect the changes contemplated by these seven provisions, Ecology must comply with the § 122.62 and § 124.5 permit modification procedures. These include procedural safeguards, such as issuance of a draft permit, public notice, and opportunity for public comment and appeal. 40 C.F.R. § 122.62 and § 124.5. The process, such as it is, for modifying permit conditions under the seven "unless otherwise authorized" provisions, includes no such procedural safeguards.

If Ecology decides to allow a permittee additional time to complete a task or to otherwise change requirements for a particular permittee, it has legal mechanisms to do so. Ecology can issue an order. RCW 90.48.240; WAC 173-201 A-160, and —180. Ecology can modify the

[11] While Mr. Johnson's testimony is that these provisions are only for modifying deadlines, the permit language includes no such restriction. Exh. E at 118 (1.21)— 120 (1.5); Exh. A at 11-12, 22, 23, and 29. Nothing in the permit language would prevent any Ecology employee from relieving a permittee of the underlying permit requirement entirely.

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ISGP as it applies to a particular permittee in compliance with procedures established in federal law. 40 C.F.R. § 122.62 and § 124.5. Ecology should not, however, be permitted to use an illegal, unspecified process to let permittees do something other than what the permit requires.

IV. RELIEF REQUESTED

The Alliance seeks an order from the Board remanding the ISGP to Ecology for reissuance without the S3.D2. compliance schedule, without the provisions for standard mixing zones, and without the language allowing changes to permit requirements for particular permittees if Ecology so authorizes in an unspecified manner. Such relief is authorized. WAC 371-08-545(2)*, Airport Communities Coalition.* PCHB No. 01-160 at 94 *(citing Marine Environmental Consortium, et al. v. Ecology,* PCHB No. 96-257, Findings of Fact and Conclusion of Law 1998; and *San Juan County v. Natural Resources,* 28 Wn. App. 796, 800 (1981).

V. CONCLUSION

For the foregoing reasons, the Board should grant the Alliance's motion for summary judgment.

RESPECTFULLY SUBMITTED, this 31st day of March, 2003.

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